IN THE

SUPREME COURT OF THE UNITED STATES

FILED
JAN 2 1974
MICHAEL RODAK, JR., CLERK

October Term, 1973

No. 73-1031

WYNN LEWIS ROBINSON,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

---

# PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOURTH DISTRICT, STATE OF CALIFORNIA

---

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Under Appointment by the District Court of Appeal, Fourth Appellate District, State of California

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PETITION FOR A WRIT OF
CERTIORARI TO THE COURT
OF APPEAL, FOURTH DISTRICT,
STATE OF CALIFORNIA

---

Petitioner Wynn Lewis Robinson, respectfully prays that a Writ of Certiorari issue to review the action of the Court of Appeal, Fourth District,

of the State of California, summarily denying petitioner's motion for recall of the remittitur on July 16, 1973. (Petition for hearing denied by the Supreme Court of the State of California on October 3, 1973.)

## OPINION BELOW

No written opinion was issued either by the Court of Appeal in summarily denying petitioner's motion, nor by the Supreme Court of the State of California in denying petitioner's petition for a hearing. Copies of the respective summary denials are appended hereto as exhibits A and B, respectively.

## JURISDICTION

The California Supreme Court denied the petition for hearing on October 3, 1973. This Court's jurisdiction is invoked under Title 23, United States Code, § 1257(3).

## QUESTIONS PRESENTED

Petitioner was denied due process of law and equal protection of the law in that he was prohibited from petitioning the California Supreme Court for a hearing on the merits of his case because of the failure of the California Court of Appeal to notify him that said court had upheld his conviction until after the time for filing a

petition to the California Supreme Court had run.

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in substance that no person shall be deprived of life, liberty or property without due process of law, and that persons charged with crimes shall be treated equally in court proceedings. The Fourteenth Amendment to the United States Constitution makes these rights of criminal defendants applicable to state court trials.

## STATEMENT OF THE CASE

In an information filed July 22, 1971, petitioner was charged with a violation of Health and Safety Code Section 11530.5, unlawful possession of marijuana for sale on March 26, 1971. A preliminary hearing was held on July 7, 1971, after which said information was filed. On January 18, 1972, a motion to suppress evidence on the grounds of an unconstitutional search and seizure was denied. On January 24, 1972, the case was submitted on the transcript of the preliminary hearing. On February 17, 1972, defendant was found guilty in the Superior Court, and on March 16, 1972, he was sentenced to three years probation, one year of which he was to serve in jail. On March 16, 1972, defendant filed a Notice of Appeal and posted the requisite

bond. On September 29, 1972, defendant's opening brief was filed in the California Court of Appeal, Fourth District, and thereafter oral argument was held. At all times relevant petitioner has been and is now represented by his present counsel, Robert L. Fitzpatrick, who has throughout the proceedings maintained his office at 9000 Sunset Boulevard, Suite 1100, Los Angeles, California 90069.

Following oral argument, Counsel for defendant received no notice of any action on the appeal by said Court until May 17, 1973, when he received the remittitur by mail at his office. Said remittitur indicated that conviction was upheld and recited that the decision of this Court was filed on March 14, 1973. The remittitur itself was dated May 14, 1973. Thereafter, on June 14, 1973, he received by mail at his office the unpublished decision of said Court, upholding the conviction. The envelope containing said unpublished opinion is postmarked June 13, 1973, and a copy of which is attached hereto as Exhibit "C" and is incorporated by reference as if fully set forth.

Defendant wished to take an appeal on the merits of his case to the California Supreme Court. However, California Rules of Court, Rule 28(b), provides that a petition for hearing to the California Supreme Court must be filed therein within 10 days after the decision of the Court of Appeal becomes final. California Rules of Court, Rule 24(a), provides that decisions of the Court of Appeal become final 30 days after

fi'ing thereof with the clerk of said court. In other words, a defendant whose conviction is upheld by the Court of Appeal has 40 days after said Court's decision is filed in which to petition the California Supreme Court for a hearing. In the instant case the 40 day period ended on April 23, 1973. Yet defendant received no notice of the decision of the said Court until after the said 40 day period.

The period for petition to the California Supreme Court to hear an appeal of the conviction having passed, defendant then moved to recall the remittitur in the Court of Appeal on July 9, 1973, as a prerequisite to petition. Said motion is appended to this petition for the Court's convenience as Exhibit "D". Said motion was summarily denied on July 16, 1973. Defendant thereafter petitioned the California Supreme Court to review the summary denial of his motion to recall the remittitur; said petition was denied without hearing on October 3, 1973 (Exhibit A).

## REASONS FOR GRANTING THE WRIT

In clear contravention of the mandate of this Honorable Court declaring that persons should not be deprived of substantial rights before being notified and having an opportunity to be heard, defendant wishes to appeal said denial on the grounds that he has been denied due process and equal protection of law in that through lack of

notice of decision of the Court of Appeal he has been unable to take an appeal which he feels has good grounds under the authority of People v. Smith, 7 Cal.3d 282 (1972), concerning the doctrine of emergency searches.

## ARGUMENT

### 1. LACK OF NOTICE OF THE DECISION OF THE COURT OF APPEAL WAS A DENIAL OF DUE PROCESS OF LAW.

It is a basic tenet of Anglo-American law that notice is essential before any important right or privilege may be taken from an individual. In recent years the concept of proper notice and hearing has been expanded to many areas heretofore immune from such requirements. (See, for example, Sniadach v. Family Finance, 395 US 337, 23 LE 2d 349 (1969), where a summary prejudgment attachment procedure, without notice to the debtor, was held to be a denial of the procedural due process guaranteed by the Fourteenth Amendment.) The essentials of due process are regular and orderly procedure in a court of competent jurisdiction, notice to the defendant, opportunity for the defendant to be heard, and a fair hearing. State v. Natomas Co., 239 Cal.App.2d 547 (1966). Further, it is clear that the right to seek redress in the courts is a protected area within the Fourteenth Amendment. Where, for example, the efforts

of a state prisoner to obtain appellate review are frustrated by prison officials, due process is denied; reasonable access to the courts is guaranteed by the Fourteenth Amendment. DeWitt v. Pail, 366 F.2d 682 (9th Cir. 1966).

While due process may be an "elusive concept" and its content may vary with circumstances and the necessities of the situation (Mover v. Peabody, 212 U.S. 78 [53 L.Ed. 410, 29 S.Ct. 235]), the essence of due process is "the protection of the individual against arbitrary action." (Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 302 [81 L.Ed. 1093, 1100, 57 S.Ct. 724].) "Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. (Hannah v. Larche, 363 U.S. 420, 442 [L.Ed.2d 1307, 1321, 80 S.Ct. 1502].) "The fundamental requisite of due process of law is the opportunity to be heard.' [Citation.] The hearing must be 'at a meaningful time and in a meaningful manner.'[Citation.]" (Goldberg v. Kelly, 397 U.S. 254, 267 [25 L.Ed. 2d 287, 299, 90 S.Ct. 1011].)

As applied to criminal matters, due process generally includes notice (In re Oliver, 333 U.S. 257 [92 L.Ed. 682, 68 S.Ct. 499]), presence and a hearing (In re Green's Petition, 369 U.S. 689 [8 L.Ed. 2 198, 82 S.Ct. 1114]), and representation by counsel (Mempa v. Rhay, 389 U.S. 128 [19 L.Ed. 2d 336, 88 S.Ct. 254]).

In People v. Youngs, 23 Cal.App.3d 180, 183-184 (1972), the Court of Appeal ruled that after probation may be revoked and before sentencing, the defendant must be given a duly-noticed hearing. Similarly, in the land-mark case of Morrissey v. Brewer, 408 U.S. 471, 33 L.Ed.2d 484 (1972), due process, meaning among other things a noticed hearing, was extended to processes for revocation of parole.

It is submitted that the original lack of notice of the decision of the Court of Appeal, will, if allowed to remain uncorrected by the granting of this writ, result in just that denial of due process which is repugnant to the constitution.

2. LACK OF NOTICE WAS DIRECTLY RESPONSIBLE FOR DEFENDANT'S FAILING TO PETITION THE CALIFORNIA SUPREME COURT FOR A HEARING WITHIN THE TIME PROVIDED BY LAW.

---

All decisions of reviewing courts shall be filed with the clerk, who shall forthwith transmit a copy of the opinion to the lower court and to the parties. The decision of the Court of Appeal becomes final as to that Court 30 days after filing (emphasis added)

California Rules of Court 24(a)

A party seeking a hearing in the California Supreme Court must serve and file a petition within 10 days after the decision of the Court of Appeal becomes final. (Emphasis added)

California Rules of Court 28(b)

In the instant case, the decision of the Court of Appeal was filed on March 14, 1973. It became final on April 13, 1973. Defendant's time to petition the Supreme Court ran out on April 23, 1973. Yet it was not until May 17, 1973, that counsel for defendant received any notice whatsoever of the decision of said court, some 60 days after the filing of said decision, and far too late to file a petition to the California Supreme Court. In derogation of the clear mandate of Rule 24(a), notice of decision was not sent "forthwith" "to all parties," at least not to defendant. Absent timely notice, defendant had no way of knowing that his conviction had been upheld, and that his time to petition the California Supreme Court for a hearing had begun to run. Not having received the said notice until after the 40 day period had run, petitioner was absolutely prohibited from filing the said petition within the time period allowed by California law.

3. DEFENDANT WAS DENIED EQUAL PROTECTION OF THE LAW IN THAT, HAD THE OPINION BEEN PUBLISHED INSTEAD OF UNPUBLISHED, HIS COUNSEL WOULD HAVE SEEN THE DECISION IN THE LEGAL PRESS, AND WOULD HAVE FILED A TIMELY PETITION.

---

Pursuant to California Rules of Court, Rule 976(b) permits opinions of the Court of the Appeal to be unpublished in the Official Reports. Only those opinions which are to be published are released to the Reporter of Decisions, and to the legal press.

This Court is respectfully requested to take judicial notice of the fact that published opinions appear in the legal press within a short time after filing thereof. For example, the July 26, 1973 issue of the Los Angeles Daily Journal carried short summaries of two state cases filed July 18, 1973, well within the time for petitioning for a hearing. A copy of said summaries are attached hereto as Exhibit "E". At the latest, the cases would have appeared in the advance sheets. By one of these two publications, defendant's counsel would have, in all likelihood, been informed of the Court's decision, notwithstanding lack of notice directly from the Court of Appeal; counsel could have then filed a timely petition

for hearing to this Court. But since the decision was unpublished, defendant had none of the advantages of those appellants in whose cases decisions were published. While it is perhaps the unusual case in which defendant is not timel notified of the decision of the Court of Appeal, nevertheless such lack of notice must occur from time to time in a Court system as big as California's. To condition notice in such situations on whether an opinion is published or unpublished (a circumstance which has nothing whatever to do with the merits of the individual case) is to create two classes of litigants, which classification is arbitrary, capricious, and unreasonable. And surely defendant's counsel is not, in this modern day society, expected to camp at the courthouse door, anxiously awaiting decisions on each of the cases in which he has represented appellants, for fear that the clerk would forget to mail the notice specified by Rule 24(a).

The Court is respectfully requested to note that defendant has suffered a felony conviction, an event that will follow him the rest of his life. To preclude him from exhausting every remedy allowed him by law is intolerable in a civilized society.

4. RECALL OF THE REMITTITUR IS JUSTIFIED WHERE THERE HAS BEEN A DENIAL OF DUE PROCESS.

---

In Posello v. Posello, 123 Cal.App.2d 31 (1954), the Court held that a remittitur need not be recalled in order to allow a petition for certiorari, to the United States Supreme Court, where it appeared that no denial of due process had occurred. The logical converse of this argument, of course, is that recall would be proper where such a denial did in fact take place. If petitioner's contention that lack of timely notice of the decision of the Court of Appeal constitutes denial of due process in the circumstances of this case is accepted, it logically follows that recall of the remittitur, and reinstatement of the petitioner's time in which to petition the California Supreme Court for a decision on the merits is justified.

5. RECALL OF THE REMITTITUR IS THE PROPER REMEDY IN THIS CASE.

---

The recall under Rule 25(d) may be ordered on the grounds of clerical error, fraud, mistate, or inadvertence.

> Southwestern Inv. Corp. v. City of Los Angeles, 38 Cal. 20 623, 626 (1952), Oppenheim v. Dutchman, 161 Cal.App.2d

501, 504 (1958), McClearen v. Superior Court, 45 Cal.2d 852, 856-857 (1955)

In point is In re Martin, 58 Cal.2d 133 (1962), a habeas corpus proceeding by a prisoner contending a deprivation of his right to appeal. The prisoner was not advised of the status of his appeal in spite of repeated efforts to contact his attorney, who had decided to abandon the case. He contacted the clerk of the Court of Appeal, who indicated that time had run and no remedies were available. Several other letters from the prisoner to the court followed, but the prisoner obtained no relief. He finally asked for a recall of the remittitur, which was granted. The court said:

> "Where a prisoner seeking judicial relief fails to take timely actions due to an act or restriction of those charged with offician responsibility, it has been held that such a person cannot be denied relief (Peo. v. Slobodion, 30 Cal.2d 362). Where the acts which cause late filing are those of a clerk of the court or other administrative official, the right to file is preserved. (Peo. v. Howard, 166 Cal. App.2d 638; Peo. v. Stinchcomb, 92 Cal. App.2d 741). "58 Cal.2d at 140."

Petitioner contends that his failure to take timely action is due to the failure of a clerk of the court or of some administrative official. Yet no determination has ever been made of this contention. The Court of Appeal issued a summary denial of petitioner's motion; the

California Supreme Court impliedly affirmed by denying a petition for hearing on the issue of the denial of the motion to recall the remittitur. At the very least, petitioner believes he is entitled to a judicial determination his claim that timely notice was never given by the Court of Appeal.

## CONCLUSION

Petitioner is not seeking, at this stage, a review by this Honorable Court, of the substantive issues of his trial. He merely seeks the right to pursue all avenues of appeal open to him, which avenues have been closed by lack of timely notice of aforesaid. To deny him this simple right, which he lost through absolutely no fault of his own, would be to render meaningless the notions of fair dealing and due process upon which our judicial system is founded, and which is the hallmark of a civilized society. It is respectfully submitted that this petition be granted.

ROBERT L. FITZPATRICK

Attorney for Petitioner
Under Appointment by the
District Court of Appeal,
Fourth Appellate District,
State of California

EXHIBIT A

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

OCT 3 1973

*I have this day filed Order*

HEARING DENIED

*In re:* 4 Crim. *No.* 5141

People

*vs.*

Robinson

*Respectfully,*

G. E. BISHEL
*Clerk*

11921 877 9 73 3M OSP

# COURT OF APPEAL — STATE OF CALIFORNIA

# FOURTH APPELLATE DISTRICT

DIVISION ONE

Court of Appeal - Fourth Dist.
FILED
JUL 16 1973
JOHN R. McDOWELL, Clerk
Deputy Clerk

PEOPLE, ETC.,

vs.

WYNN LEWIS ROBINSON

4 Crim. NO. 5141

SUPERIOR COURT NO. CRN-1763

BY THE COURT:

Defendant's motion to recall remittitur and reinstate appeal is denied.

Wilson Acting P.J.

Copies to: Robert L. Fitzpatrick-LA
Attorney General-SD
District Attorney-SD
Superior Court-SD

EXHIBIT B

88CCS-114 11-71 3M OSP

EXHIBIT "A"

COURT OF APPEAL
FOURTH APPELLATE DISTRICT
DIVISION ONE
CIVIL RIGHTS BUILDING
STH U'ZOO, CALIF. 92101

Mr. Robert L. Fitzpatrick
Attorney at Law
9000 Sunset Blvd., Suite 1100
Los Angeles, California 90069

Exhibit A

Court of Appeal - Fourth Dist.
FILED
JUL 11 1973
JOHN R. McDOWELL, Clerk
Deputy Clerk

No. 4 Crim. 5141

IN THE

# COURT OF APPEAL

OF THE

STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

WYNN LEWIS ROBINSON

MOTION TO RECALL REMITTITUR AND REINSTATE THE APPEAL IN ORDER TO PETITION FOR HEARING BEFORE THE SUPREME COURT OF THE STATE OF CALIFORNIA; DECLARATION OF ROBERT L. FITZPATRICK; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION

ROBERT L. FITZPATRICK
Attorney at Law
9000 Sunset Boulevard, Suite 1100
Los Angeles, California 90069

(213) 272-7771

Attorney for Defendant and Appellant
Under Appointment by the District
Court of Appeal, Fourth Appellate
District

EXHIBIT "D"

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

| | |
|---|---|
| THE PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>-vs-<br><br>WYNN LEWIS ROBINSON,<br><br>Defendant and Appellant. | No. 4 Crim. 5141 |

MOTION TO RECALL REMITTITUR AND REINSTATE THE APPEAL IN ORDER TO PETITION FOR HEARING BEFORE THE SUPREME COURT OF THE STATE OF CALIFORNIA; DECLARATION OF ROBERT L. FITZPATRICK; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION

ROBERT L. FITZPATRICK
Attorney at Law
9000 Sunset Boulevard, Suite 1100
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Attorney for Defendant and Appellant
Under Appointment by the District
Court of Appeal, Fourth Appellate
District

TO THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT:

Defendant and Appellant Wynn Lewis Robinson respectfully moves the court for an order recalling the remittitur and reinstating the appeal in order to petition for hearing in the Supreme Court of the State of California.

This motion is made on the grounds that defendant was not notified of the decision of the above entitled court affirming his conviction within the period prescribed for petitioning the Supreme Court for hearing, said lack of notice hereby deprived defendant of an opportunity to petition the Supreme Court in being the denial of due process of law.

Said motion is based upon pleadings, records, and filings in this action, the attached declaration of Robert L. Fitzpatrick, the attached Memorandum of Points and Authorities, and Exhibit "A" attached hereto.

Respectfully submitted,

Dated: July 9, 1973

Robert L. Fitzpatrick
Attorney for Defendant and Appellant
Under Appointment by the District
Court of Appeal, Fourth Appellate
District

DECLARATION OF ROBERT L. FITZPATRICK

I, Robert L. Fitzpatrick, declare and state as follows:

1. I am an attorney at law duly qualified to practice in all Courts of the State of California. At all times herein I have maintained my office at 9000 Sunset Boulevard, Suite 1100, Los Angeles, California 90069.

2. I am the attorney of record for the defendant in the instant action, and make this declaration in support of the motion of defendant for an order recalling the remittitur in said case.

3. In an information filed July 22, 1971, my client was charged with a violation of Health and Safety Code Section 11530.5, unlawful possession of marijuana for sale on March 26, 1971. A preliminary hearing was held on July 7, 1971, after which said information was filed. On January 18, 1972, a motion to suppress evidence on the grounds of an unconstitutional search and seizure was denied. On January 21, 1972, the case was submitted on the transcript of the preliminary hearing. On February 17, 1972, defendant was found guilty by the Court, and on March 16, 1972, he was sentenced to three years probation, one year of which he was to serve in jail. On March 16, 1972, defendant filed a Notice of Appeal and posted the requisite bond.

4. On September 29, 1972, I filed defendant's opening brief with this Court.

5. I received no notice of any action by this Court until May 17, 1973, when I received by mail at my office, the remittitur. Said remittitur recited that the decision of this court was filed on March 11, 1973. The remittitur itself was dated May 14, 1973.

6. On June 14, 1973, I received by mail at my office the unpublished decision of this Court. The envelope containing said unpublished opinion is postmarked June 13, 1973, and is attached hereto as Exhibit "A"

and is incorporated by reference as if fully set forth.

7. Having represented by client from the times of his preliminary hearing, having consulted with him, and having researched the applicable law, I believe that defendant has good grounds for an appeal to the Supreme Court on the authority of People v Smith, 7 Cal 3d 282 (1972), concerning the doctrine of emergency searches.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 9, 1973, at Los Angeles, California.

Robert L. Pettigrew

MEMORANDUM OF POINTS AND AUTHORITIES

Defendant submits the following memorandum of points and authorities in support of his motion to recall the remittitur in the instant case:

1. A REMITTITUR MAY BE RECALLED BY ORDER OF THE REVIEWING COURT ON ITS OWN MOTION OR ON MOTION OR PETITION AFTER NOTICE SUPPORTED BY AFFADAVITS.

California Rules of Court, Rule 25 (d)

The recall may be ordered on the grounds of clerical error, fraud, mistate, or inadvertence.

Southwestern Inv. Corp. v City of Los Angeles, 38 Cal 2o 623, 626 (1952), Oppenheim v. Dutchman, 161 Cal App 2d 501, 504 (1958), McClearen v Superior Court, 45 Cal 2d 852, 856-857 (1955)

2. DENIAL OF THIS MOTION WILL RESULT IN A DENIAL OF DEFENDANT'S RIGHT TO APPEAL HIS CONVICTION TO THE SUPREME COURT.

All decisions of reviewing courts shall be filed with the clerk, who shall forthwith transmit a copy of the opinion to the lower court and to the parties. The decision of the Court of Appeal becomes final as to that Court 30 days after filing. (emphasis added)

California Rules of Court 24 (a)

A party seeking a hearing in the Supreme Court must serve and file a petition within 10 days after the decision of the Court of Appeal becomes final. (emphasis added)

California Rules of Court 28 (b)

In the instant case, the decision of the Court of Appeals was filed on March 14, 1973. It became final on April 13, 1973. Defendant's time to petition the Supreme Court ran out on April 23, 1973. Yet it was not until

May 17, 1973, that counsel for defendant received any notice whatsoever of the decision of this court, some 60 days after the filing of said decision, and far too late to file a petition to the Supreme Court. In derogation of the clear mandate of Rule 24 (a), notice of decision was not sent "forthwith" "to all parties," at least not to defendant.

The court is respectfully requested to note that defendant has suffered a felony conviction, an event that will follow him the rest of his life. To preclude him from exhausing every remedy allowed him by law is intolerable in a civilized society.

It is a basic tenet of Anglo-American law that notice is essential before any important right or privilege may be taken from an individual. In recent years the concept of proper notice and hearing has been expanded to many areas heretofore immune from such requirements. (See, for example, Sniadach v Family Finance, 395 US 337, 23 LE 2d 349 (1969), where a summary prejudgment attachment procedure, without notice to the debtor, was held to be a denial of the procedural due process guaranteed by the Fourteenth Amendment.) The essentials of due process are regular and orderly procedure in a court of competent jurisdiction, notice to the defendant, opportunity for the defendant to be heard, and a fair hearing. State v Natomas Co., 239 cal app 2d 547 (1966). Further, it is clear that the right to seek redress in the courts is a protected area within the Fourteenth Amendment. Where, for example, the efforts of a state prisoner to obtain appellate review are frustrated by prison officials, due process is denied; reasonable access to the courts is guaranteed by the Fourteenth Amendment. DeWitt v Pail, 366 F. 2d 682 (9th Cir, 1966),

It is submitted that the original lack of notice of this court's decision, while indoubtedly due to mistake or clerical oversight or error, failure of the postal system or loss or mail theft, and not to deliberate plan

or design, will, if allowed to remain uncorrected by the granting of this motion, result in just that denial of due process which is repugnant to the constitution.

3. RECALL OF THE REMITTITUR IS THE PROPER REMEDY IN THIS CASE.

As noted above, a remittitur may be recalled for clerical error, fraud, mistake or inadvertence, and defendant may then pursue his petition to the Supreme Court. In point is In re Martin, 58 Cal 2d 133 (1962), a habeas corpus proceeding by a prisoner contending a deprivation of his right to appeal. The prisoner was not advised of the status of his appeal in spite of repeated efforts to contact his attorney, who had decided to abandon the case. He contacted the clerk of the Court of Appeal, who indicated that time had run and no remedies were available. Several other letters from the prisoner to the court followed, but the prisoner obtained no relief. He finally asked for a recall of the remittitur, which was granted. The court said:

> "Where a prisoner seeking judicial relief fails to take timely actions due to an act or restriction of those charged with official responsibility, it has been held that such a person cannot be denied relief (Peo. v Slobodion, 30 Cal 2d 362). Where the acts which cause late filing are thos of a clerk of the court or other administrative official, the right to file is preserved. (Peo. v Howard, 166 Cal App 2d 638; Peo. v Stinchcomb, 92 Cal App 2d 711). " 58 Cal 2d at 140.

Undoubtedly defendant's failure to receive notice was due to a clerical or administrative error, or a failure of the United States Postal system. As such, his right to file his peition for a hearing should be preserved, and the remittitur should be recalled.

In accord are Oil Base v Transport Indem Co., 148 Cal App 2d 490 (1951), where failure to fix a date from which interest should be calculated was grounds for a recall, and People v Bartges, 128 Cal App 2d 496 (1954),

where the appellate court was mistakenly advised that the defendant had three prior convictions, but in fact two were struck by the trial court. "A mistake of fact by an appellate tribunal which results in prejudicial error or a miscarriage of justice affords a proper ground for recall of the remittitur." 128 Cal App 2d at 497-498. Defendant submits that denial of his right to petition for a hearing would be such a miscarriage of justice.

4. DEFENDANT HAS GOOD GROUNDS FOR APPEAL.

The entire disposition of the substantive issues in this case revolves around the reasonableness of the search of defendant's hotel room. The people seek to justify the search on the emergency search doctrine. The record indicates that defendant was asleep in his hotel room when the room clerk, for reasons that are not clear to defendant, summoned the police, who then entered his room where they found marijuana. In People v Smith, 7 Cal 3d 282 (1972), a landlady found her tenent's six year old child outside the tenant's apartment. She took the child to her apartment and later called the police. A police officer, without a warrant, knocked on tenant's door and identified himself, but received no response. He then entered the apartment, called the mother's name, but received no answer. He found some marijuana, and when the mother returned, he arrested her. The Supreme Court affirmed the suppression of evidence, holding that "the (emergency search) exception must not be permitted to swallow the rule; in the absence of a showing of true necessity - that is, imminent and substantial threat to life, health, or property - the constitutionally guaranteed right to privacy must prevail" 7 Cal 3d at 286.

In the instant case, we have no such clear showing of imminent danger. The hotel clerk did not bother to check the sleeping defendant for signs of life. Nor was the entering police officer very concerned about the supposedly unconscious or perhaps dead man. Defendant believes that he

can successfully argue that the entry into his hotel room was based on mere suspicion of an untrained observer that marijuana might be present, and not on any great concern for his well-being.

## CONCLUSION

By the actions of the clerk of this court, or a failure of the United States Postal system, the time for filing a petition with the Supreme Court ran before defendant was notified that his conviction was affirmed. Denial of this motion would result in defendant's being denied his right to petition for a hearing, and would therefore because of the last of notice be a denial of due process repugnant to the Constitution. Recall of the remittitur is the proper remedy, before defendant can proceed further. Defendant believes he can perfect a successful appeal.

It is respectfully submitted that this motion be granted.

Dated: July 9, 1973

Robert L. Fitzpatrick
Attorney for Defendant

# Suspicion Sufficient To Permit Search

The C.A. 4th recently held that where a customs officer, whose duty it is to inspect merchandise which crosses the border into the United States, reasonably suspects that the imported item contains contraband, he may search the item.

The State Supreme Court retransferred to the Court of Appeals a determination as to the merits of issuing an alternative writ of mandate requested by the People to set aside the lower court's order suppressing evidence.

Defendants were arrested when they claimed surf boards delivered from Pakistan which were found to contain hashish.

The customs officer noticed that the surf boards were heavier than ones of similar size. Having himself discovered contraband in surf boards imported from the same area within recent months, the officer punctured the board with his pocket knife, causing the release of a gas with the odor of marijuana. He then cut a one inch square and examined some of the substance to confirm his suspicion.

The court noted that although a border search must meet the Fourth Amendment test of reasonableness, it may be conducted on the mere suspicion of the customs agent that contraband is undeclared. The quantum of suspicion required to satisfy the reasonableness test, and thereby justify the governmental intrusion, depends on the degree of intrusion and the extent of a person's reasonable expectation of privacy.

The court observed that since it was a matter of judicial record that Pakistan was a source of hashish in recent years and due to the personal experience of the officer involved, suspicion of any surf board arriving from Pakistan was warranted.

The C.A. vacated the order suppressing the evidence.

**People v. Superior Court**, C.A. 4th, 4 Civ. 13085, July 18, 1973, per Kerrigan, J. Cecil Hicks, Michael R. Capizzi, Oretta D. Sears for petitioner; Frank L. Williams, Jr., Gale P. Hickman, Russell E. Parsons and Michael D. Pursell for real party in interest. (ams)

EXHIBIT "E"

# Rulings Summarized

Following are condensed versions of the latest opinions of the California Appellate Courts. These brief statements of the rulings are printed for quick checking by the attorney. The full text of the opinion should be read before any case is cited in litigation. It will appear in the near future in the weekly Appellate Report supplement.

## Right to Vote Not Denied In County Reorganization

The C.A. 3d. has held that in a reorganization of recreation and park districts the consent of the community whose property is to be detached and annexed by an adjacent community is not required pursuant to the District Reorganization Act of 1965 (Government Code Sec. 56000 et seq.).

Plaintiffs appeal a dismissal of their complaint, without leave to amend, following the sustaining of the general demurrer to the second amended complaint.

The Sacramento County Board of Supervisors examined a reorganization plan to detach an area from Del Paso, an "autonomous district," and to annex that territory to Citrus Heights, an area governed by the Sacramento Board. The board proposed a resolution calling for a confirmatory election by the residents of the territory. However, due to disagreement over the extent of the franchise, the supervisors changed the original preference for an election and ordered the annexation.

In holding that the residents of Del Paso were not denied their constitutional "right to vote," the court noted that the consent requirement of Sec. 56004 is qualified in light of the other relevant provisions of the Reorganization Act. The C.A. observed that since the legislative intent was to facilitate reorganization which would be responsive to the needs of the voters, taxpayers and the community, where reorganization was of the magnitude undertaken by the Sacramento board, consent was not required.

The court also noted that Del Paso's reliance upon the board's initially expressed preference for a confirmatory election did not give rise to an issue of estoppel.

**Del Paso Recreation and Park District v. Board of Supervisors of the County of Sacramento, C.A. 3d, 3 Civ. 13535, July 18, 1973, per Janes, J. (ams)**

## Public Won't Confuse 'Playgirl' With 'Playboy'

Agreeing with the district court's finding that "the name 'Playgirl' is not likely to cause confusion to members of the public with 'Playboy'," the Ninth Circuit Court of Appeals affirmed that lower court's ruling that the users of the former name were not infringing on the trademarks of the latter nor engaging in any unfair competition.

Defendants were proprietors, at various times, of nightclubs named "The Play Girl," "The Play Girl No. 2," "The Play Girl No. 3" and "Playgirl Club." Playboy Clubs International and its parent corporation, HMH Publishing Co., Inc., sued for trade-name infringement under the federal Lanham Act and unfair competition under California law. The physical lay out of defendants clubs was found to bear "no resemblance to a Playboy Club," nor were the costumes of the waitresses and dancers similar to those of Playboy bunnies. There was no separate dining room or bar in their facilities and no food was served other than sandwiches. The trial court concluded from these facts that there was "no likelihood of confusion as to the source of the nightclubs operated by defendants."

On appeal, plaintiff's pointed to their enormous expenditures on advertising and promotion as a factor entitling them to greater protection. The appellate court rejected this contention, quoting from one of its previous opinions that "a large expenditure of money does not in itself create legally protected rights." Nor did the three judge panel disagree with the trial court's use of the "likely to cause confusion" test. Appellant's argument for relief under California law was also dismissed by the appellate court, which quoted an earlier district court opinion to the effect that an "overly broad application" of state law be avoided "lest it swallow up all competition in the claim of protection against trade name infringement."

**HMH Publishing Co., Inc. v. Lambert, USCA 9th, 71-2007, July 10, 1973, per Trask, J. . (jjm)**

## Private Insurers Are 'Gov't. Agents' for Medicare Purposes

The Ninth Circuit Court of Appeals has held that private insurance carriers utilizing federal funds to pay the Medicare claims of physicians are "government paying agents." The ruling rejected the arguments of an appellant doctor and affirmed his conviction for committing fraud upon a U.S. "department or agency."

Appellant, a San Fernando Valley physican, had been indicted on 46 counts of submitting false Medicare claims to various private insurance companies. The insurers process and pay these claims under contracts with the Social Security Administration of the U.S. Department of Health, Education and Welfare. Appellant had made representations on each of the 46 claims that he had made a number of visits to elderly patients in various convalescent hospitals. Many of these same patients testified at trial that they were visited infrequently, if at all, by appellant. Their testimony was fully corraborated by nursing personnel at the facilities.

In addition, some of the patients had not even been in the hospitals on the days appellant claimed to have visited them. The jury found appellant guilty on 39 counts of the indictment, the government having dropped the remainder. The physician was

**Please turn to Page 16**

# Rulings Summarized

**Continued from Page 1**

sentenced to pay fines totaling $53,500.00 and received a suspended prison sentence.

Many of appellant's appeal points were called "frivolous" and not even discussed by the appellate panel. His argument was that the private carriers were not a government agency and therefore the indictment failed to state an offense against the government. The court held that the insurers were "government paying agents" for the purpose of 18 USC Sec. 1001, the "fraud on an agency" statute under which appellant was indicted. The panel also found that the statute was not void for vagueness and they dismissed other numerous arguments by appellant, specifically, concluding that "we find none of them meritorious."

**U.S. v. Matanky, USCA 9th, 73-1190, July 5, 1973 per Hamlin, J. (jjm)**

# In The Supreme Court of The United States

October Term 1973

No. 73-1031

WYNN LEWIS ROBINSON,

*Petitioner,*

*v.*

THE PEOPLE OF THE STATE OF CALIFORNIA,

*Respondent.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

---

## BRIEF OF RESPONDENT PEOPLE OF THE STATE OF CALIFORNIA IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

---


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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1973

No. 73-1031

WYNN LEWIS ROBINSON,

*Petitioner,*

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THE PEOPLE OF THE STATE OF CALIFORNIA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

# BRIEF OF RESPONDENT PEOPLE OF THE STATE OF CALIFORNIA IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

## OPINIONS BELOW

On March 14, 1973, the Court of Appeal of the State of California, Fourth Appellate District, Division One, affirmed petitioner's conviction in an unpublished opinion. (*See* Appendix A.)

On July 16, 1973, the above Court of Appeal denied without opinion petitioner's motion to recall the remittitur and reinstate the appeal. (*See* Appendix B.)

On October 3, 1973, the California Supreme Court denied without opinion petitioner's application for hearing. ( *See* Appendix C.)

## JURISDICTION

Petitioner asserts jurisdiction under 28 U.S.C. §1257 (3).[1/]

## QUESTIONS PRESENTED[2/]

Whether the Court of Appeal's refusal to recall its remittitur to allow petitioner to apply for a discretionary hearing in the California Supreme Court denies petitioner due process of law where failure to apply to the state Supreme Court within rule time was due to petitioner's own gross negligence and other wrongful conduct.

Whether the Court of Appeal's decision not to publish in the official reports its opinion affirming petitioner's conviction is a denial of equal protection of law.

Whether the California Court of Appeal ought to be compelled to recall its remittitur to allow petitioner to apply for a discretionary hearing before the California Supreme Court when petitioner's own wrongful conduct prevented him from applying to the state Supreme Court within rule time.

---

[1/] Petitioner's reference to 23 U.S.C. 1257 (3) is obviously erroneous, and apparently an intended invocation of 28 U.S.C. 1257 (3)

[2/] Petitioner asserts he "was denied due process of law and equal protection of law in that he was prohibited from petitioning the California Supreme Court for a hearing on the merits of his case because of the failure of the California Court of Appeal to notify him that said court had upheld his conviction until after the time for filing a petition to the California Supreme Court had run." (*See* Petitioner's Brief, pp. 2-3.)

## CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES OF COURT INVOLVED

California Health and Safety Code section 11530.5, and California Rules of Court, Rules 24(a), 25(d), 28(b) and 976, are set out in the Appendix.

## STATEMENT OF THE CASE

Petitioner was charged in an information filed July 22, 1971, with unlawful possession of marijuana for sale in violation of former California Health and Safety Code section 11530.5, now section 11359. (*See* Appendix D; CT 1.)[3/] On August 3, petitioner, being represented by counsel, entered a plea of not guilty and waived statutory time for trial. (CT 5.) On January 22, 1972, petitioner moved to suppress evidence. (CT 8.) This motion was continued until January 18, 1972, when it was denied. (CT 9.)

On January 24, 1972, the case was submitted on the transcripts by stipulation, and continued until February 17, 1972. (CT 10.) On that date petitioner was found guilty as charged, by the court. (CT 11.)

Petitioner was granted three years probation on condition he serve one year in the County Jail. On March 16, 1972, petitioner filed notice of appeal. (CT 3.) The probation order was stayed pending his appeal. (CT 12.)

After the filing of briefs in the Court of Appeals by the

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[3/] CT refers to the Clerk's Transcript on appeal to the Court of Appeal of the State of California, Fourth Appellate District, Division One in case number 4 Criminal 5141. If the Court so desires, we will furnish the transcript from the trial upon request.

respective parties, counsel for petitioner requested by letter that the matter be placed on calendar for oral argument. (*See* Appendix E.) The matter was thereupon calendared for oral argument on March 13, 1973. The minutes of the Court of Appeal reflect that counsel for petitioner appeared at the time and place set for oral argument, but waived argument at that time, and the matter was submitted upon the briefs which had been filed. (*See* Appendix F.)

The Court of Appeal filed its unpublished opinion affirming the judgment of conviction on March 14, 1973. (*See* Appendix A, p. 1.) On that date a copy of the opinion was delivered to respondent and a copy was mailed by first class mail, postage prepaid, to counsel for petitioner at his office, to wit: 9000 Sunset Boulevard, Suite 1100, Los Angeles, California 90069. (*See* Appendix G.) The records of the Court of Appeal contain no indication that the opinion mailed to counsel was returned to the court. In addition, a copy of that opinion was mailed directly to petitioner at his last known address (*see* Appendix G) which he had given the trial court as a prerequisite to his release on bail (CT 12; *see* Appendix H). The opinion mailed to petitioner was returned, marked by the United States Postal Service, "Moved, left no address." (*See* Appendix I.)

On May 14, 1973, the Court of Appeal issued a remittitur to the superior court, decreeing the judgment affirmed. (*See* Appendix J.) Thereafter on June 13, 1973, upon the request of counsel for petitioner, a second copy of the Court of Appeal's opinion was mailed by the clerk of that court to counsel. (*See* Appendix G.)

On July 16, 1973, the Court of Appeal denied without opinion petitioner's motion to recall the remittitur and reinstate the appeal. (*See* Appendix B.) On October 3, 1973, the California Supreme Court denied without opinion petitioner's application for hearing. (*See* Appendix C.)

## STATEMENT OF FACTS

The salient facts underlying petitioner's conviction are recorded in the opinion of the Court of Appeal. (*See* Appendix A, pp. 2-3.)

## SUMMARY OF ARGUMENT

The records of the Court of Appeal show that notice of the opinion of the Court of Appeal was timely and properly sent to both petitioner and his counsel. The records show that a copy of the opinion was mailed petitioner's counsel at his correct address, and was not returned by the Postal Service to the court, and that petitioner failed to personally receive a copy because of his failure to inform the Court of Appeal of his change of address, although he was under a duty to notify the court of his current residence as a condition to release on bail pending appeal.

Petitioner would not have received notice of affirmance sooner were all criminal cases published in California because the sheer volume of cases would long delay publication.

The refusal of the Court of Appeal to recall its remittitur presents no substantial federal question.

## ARGUMENT

### I

### ANY FAILURE OF PETITIONER TO RECEIVE NOTICE THAT HIS CONVICTION HAD BEEN AFFIRMED BY THE COURT OF APPEAL WAS DUE TO PETITIONER'S OWN NEGLECT AND MISCONDUCT AND DENIED PETITIONER NO DUE PROCESS OF LAW, AND HIS OWN LACK OF DILIGENCE WAS THE CAUSATIVE FACTOR IN PETITIONER'S FAILURE TO PETITION FOR A HEARING IN THE CALIFORNIA SUPREME COURT WITHIN THE TIME PROVIDED

Petitioner asserts he was precluded from filing a petition for a hearing in the California Supreme Court within rule time because he failed to receive a copy of the Court of Appeal's opinion affirming his conviction, and thus did not receive timely notice. (*See* Petitioner's Brief, pp. 8-9.)

At issue first in this case is whether petitioner was denied due process of law where his own negligence and misconduct prevented him from timely receiving a copy of the Court of Appeal's opinion.

California Rules of Court, Rule 28(b) provides that a petition for hearing in the California Supreme Court must be filed within ten days after the decision of the Court of Appeal becomes final. (*See* Appendix K.) Rule 24(a) makes final the decision of the Court of Appeal thirty days after filing. (*See* Appendix K.) Thus, the petition for hearing in the state Supreme Court must be filed between the thirtieth and fortieth day following filing of the Court of Appeal's opinion.

On March 14, 1973, the day the Court of Appeal issued its opinion, the clerk of that court mailed directly to petitioner a copy of that opinion, addressed to his last known address.

(*See* Appendix G.) Although the court records do not appear as a formal order, it was obviously petitioner's duty, as a condition to his release on bail pending appeal, to keep the court informed of his current address. (CT 12; *see* Appendix H.) The opinion mailed by the clerk was returned, marked by the United States Postal Service, "Moved, left no address." (*See* Appendix I.) Thus, petitioner failed to personally receive timely notice of the Court of Appeal's decision by his own negligent misconduct of changing his residence while on bail, without properly notifying the court, and by not leaving a forwarding address with the Post Office. While petitioner is not expected to camp on the courthouse doorstep, he certainly can be expected to exercise a modicum of diligence. Thus, if petitioner did not apply to the state Supreme Court within the time allowed by rule, that was simply the result of his own lack of diligence.

It is well established that a claim of denial of due process of law must be predicated upon wrongful state action. *Burton v. Wilmington Pkg. Auth.*, 365 U.S. 715, 721-722 (1960); *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). Since petitioner failed to receive the opinion because of his own misconduct and negligence, rather than any wrongful act on the part of any state agent, there was no denial of due process.

Moreover, petitioner's assertion that his counsel never received a copy of the opinion which was properly mailed to counsel on March 14, 1973, and not returned to the court (*see* Appendix G), is not persuasive. It is just as likely that counsel merely failed to notice the receipt of that opinion. Such inadvertence would certainly not be the result of wrongful conduct by any state agent. Thus, there was simply no due process violation. *Burton v. Wilmington Pkg. Auth., supra.*

## II

## A CRIMINAL LITIGANT IS NOT DENIED EQUAL PROTECTION OF LAW BY VIRTUE OF THE FACT THE APPELLATE COURT'S OPINION IS NOT PUBLISHED IN THE OFFICIAL REPORTS

Petitioner asserts that because he was denied the dubious distinction of having the Court of Appeal order its opinion affirming his conviction published in the official reports, he was denied equal protection under the law. (*See* Petitioner's Brief, pp. 10-11.) Petitioner cites absolutely no authority to support that contention.

There is wide leeway allowed the States by the Equal Protection Clause to promulgate rules that appear to affect similarly situated people differently, and a presumption of validity adheres to such rules. While the distinctions drawn by a challenged regulation must bear some rational relationship to a legitimate state end, such regulations will be set aside only if based upon reasons totally unrelated to that goal. *McDonald v. Board of Election*, 394 U.S. 802, 808 (1968).

There is no requirement here to show a compelling state interest because there is no suspect classification involved. There is also nothing in the rules promulgated regarding the publication of opinions which has an impact on petitioner's ability to exercise his right to appeal. *Id.*, at 807.

By rule of court, opinions of the Courts of Appeal in California are only published if it is determined by the justices signing the opinion, or the Justices of the California Supreme Court that the opinion of the Court of Appeal adds to the existing state of the law. (California Rules of Court, Rule 976; *see* Appendix L.) The already enormous volume of cases published in the official California reports represent but a small fraction of the actual number of cases decided by this state's Courts of Appeal. The rule limiting publication is designed to limit the number of cases to those which are instructive to the bench and bar. Should

California be required to publish all decisions of the Courts of Appeal, the legal profession would be inundated by mountains of uninstructive case material leading to confusion and inefficiency, while overburdened taxpayers would be subjected to even greater expense. Thus, the rule limiting publication is a rational approach to a compelling state goal.

Moreover, aside from receiving notice of the decision of the Court of Appeal, petitioner has absolutely no interest in having the decision affirming his conviction published. The simple measure of providing the Court of Appeal with a correct address will in all cases adequately assure a criminal litigant prompt notice of the appellate court's decision. On the other hand, reliance on the publication of official reports for notice of the decision would be a cumbersome and inefficient method of learning of the appellate court's decision. The sheer volume of criminal cases decided by the California Courts of Appeal, if they were all published, would assure they would never appear in print during the time allowed to petition for a hearing in the California Supreme Court.

Thus, on balance, petitioner's interests are negligible indeed as compared with the compelling state interests in this instance.

## III

## REFUSAL OF THE COURT OF APPEAL TO RECALL ITS REMITTITUR PRESENTS NO SUBSTANTIAL FEDERAL QUESTION

Petitioner has set forth an argument purporting to demonstrate the truism that recall of the remittitur is justified where there has been a denial of due process. (*See* Petitioner's Brief, p. 12.) With that proposition there can hardly be dispute. Petitioner then argues that recall of the remittitur is proper in this case (*see* Petitioner's Brief, pp. 12-14), but he fails to show good cause for that action.

The Court of Appeal has discretion to recall its remittitur for good cause. (California Rules of Court, Rule 25 (d); *see* Appendix M.) But, the denial of petitioner's motion to recall the remittitur by the Court of Appeal was implicitly a determination, based upon its own records, that there was no good cause.

Following the Court of Appeal's denial of the motion to recall the remittitur the state Supreme Court declined petitioner a hearing. (*See* Appendix C.) But, an appellate court in California may excuse tardy filing in appropriate cases. *In re Benoit*, 10 Cal.3d 72, 86-89. Thus, notwithstanding the California Rules of Court specifying time requirements, petitioner could have applied to the state Supreme Court for relief from default, and had his case heard on the merits. Also, he could have petitioned that court for a writ of habeas corpus, as was done in *In re Benoit*, *supra*. Finally, he could have, as he did here, sought relief by a motion for recall of the remittitur and if successful, had the merits considered by the state Supreme Court. Accordingly, he was not denied the right to petition the state Supreme Court for a discretionary hearing on the merits of his appeal, and therefore he was not denied due precess of law.

Since appellant was denied no right guaranteed to him by

the United States Constitution, or by federal statute (*see* Arguments I and II, *supra*), there is no substantial federal question presented and there are no issues which should be considered by this Court. *Cardinale v. Louisiana*, 394 U.S. 437, 438-439 (1969).

## CONCLUSION

For the foregoing reasons, it is respectfully requested that the instant application for writ of certiorari be denied.

Respectfully submitted,

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of the State of California

JACK R. WINKLER, Chief Assistant
Attorney General–Criminal Division

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JON F. FARRELL,
Deputy Attorney General

Attorneys for Respondent.

CR SD
74-USC-03

# APPENDIX A

CALIFORNIA REPORTS
3-14-73

IN THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

Court of Appeal - Fourth D
MAR 13 1973
JOHN [illegible] POWELL, Cl

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
WYNN LEWIS ROBINSON,
Defendant and Appellant.

4 Crim. No. 5141

(Sup. Ct. No. CRN-1763

O P I N I O N

APPEAL from a judgment of the Superior Court of San Diego County. Franklin B. Orfield and Louis M. Welsh, Judges. Affirmed.

Robert L. Fitzpatrick, under appointment by the Court of Appeal, for Defendant and Appellant.

Evelle J. Younger, Attorney General, Edward A. Hinz, Jr., Chief Assistant Attorney General, William E. James, Assistant Attorney General, A. Wells Petersen and Jon F. Farrell, Deputy Attorneys General, for Plaintiff and Respondent.

The defendant, Wynn Lewis Robinson, was found guilty by the court of unlawfully possessing marijuana for sale (Health & Saf. Code §11530.5) after the court denied his motion to suppress

# APPENDIX A

evidence under Penal Code section 1538.5. The trial court granted him probation. He appeals the judgment.

At about 1:25 in the morning on March 26, 1971, Robinson registered for a room at an Oceanside motel and instructed the clerk to place a wake-up call to him at 8:00 a.m. Robinson did not answer the clerk's 8 o'clock call even though the telephone rang five to eight times. Nor did Robinson answer when, five to ten minutes later, the clerk phoned a second time.

At about 8:10 a.m., on seeing Robinson's car was not parked where he had left it when he registered, the clerk went to check Robinson's room to see if Robinson had followed a somewhat common scheme to steal televisions in motels. He knocked loudly on Robinson's door three or four times. Since there was no response from inside, he opened the door and went into Robinson's room where he saw Robinson, dressed only in shorts, lying face down on the bed and not moving. The clerk could not see any breathing by Robinson and, after the phone calls and knocking without response, thought there was something wrong with him.

When he entered Robinson's room, the clerk also saw an open suitcase holding paper-wrapped brick-shaped packages, and an open one containing what looked to him like tobacco, but which he supposed could have been marijuana. After spending about a minute in the room and without touching or speaking to Robinson, the clerk returned to the motel office, called the police to request assistance, and reported the facts.

# APPENDIX A

Patrol Officer Fried of the Oceanside Police Department received the dispatcher's call to go to the motel regarding suspicious circumstances and arrived there shortly after 8:15 a.m. The clerk told Fried what he had seen. On the basis of this information, Officer Fried believed the man inside was quite possibly and most likely in possession of a large quantity of marijuana, might possibly be a drug user, and quite possibly was "overdosed" with drugs or dead.

Fried advised the clerk they had better check on the welfare of Robinson and asked the clerk to let him in the room. They immediately went to the door of Robinson's room so Fried could investigate the possibility of Robinson's being in need of medical attention and having marijuana. The clerk again unlocked the door without, however, knocking or saying anything. Fried pushed the door open and, from outside the room and through the doorway, saw an open suitcase containing numerous brick-shaped packages, and an open package of marijuana sitting on a vanity table.

Without knocking or speaking, Fried then stepped into the room, saw Robinson lying on the bed apparently unconscious, and walked to one corner of the room to momentarily take a close look at the marijuana for a couple of seconds. He then went to the opposite corner of the room, shook Robinson until he awoke, and placed him under arrest.

Robinson asserts the trial court erred in denying his motion to suppress the evidence because Fried's entry into the motel room

# APPENDIX A

was accomplished without probable cause, without complying with Penal Code section 844, and, further, the clerk had no authority to consent to the officer's entry of appellant's room.

Initially, in order to justify a seizure without a warrant on the ground no "search" was involved, the objects seized must have been in the plain view of an officer who has a right to be in the position to have that view (Harris v. United States, 390 U.S. 234, 236 [88 S.Ct. 992]), and must have been fully disclosed and open to the eye and hand (People v. Marshall, 69 Cal. 2d 51, 57-58).

Aside from any question of probable cause to arrest Robinson or to search the motel room on the basis of the interview with the clerk, after learning of the clerk's actions and observations, Officer Fried certainly had probable cause to investigate Robinson's physical condition and the likely presence of marijuana in the room. (See, e.g., People v. Berutko, 71 Cal. 2d 84, 90.) As Fried arrived at the motel room door to investigate he was thus acting properly in the performance of his duties as a peace officer. (See People v. Superior Court [Manfredo], 17 Cal. App. 3d 195, 201.) Accordingly, when the clerk unlocked the door and Fried pushed it open, Fried had a right to be where he was as an officer in the performance of his duties.

At this point, the marijuana was fully disclosed and open to the eyes and hands of Officer Fried, and he had probable cause to arrest Robinson. (Cf. People v. Superior Court [Manfredo],

# APPENDIX A

supra, 17 Cal. App. 3d 195, 201-202.) His entry was thus proper and it can be concluded there was no "search" within the Fourth Amendment warrant requirement. (Cf. People v. Marshall, supra, 69 Cal. 2d 51, 57-58; People v. Boone, 2 Cal. App. 3d 66, 69.)

There are facts here which also give rise to the emergency doctrine exception to the warrant requirement, assuming a "search" within the Fourth Amendment warrant requirement did in fact take place. Officer Fried had two purposes to his investigation, one of which was to determine whether Robinson was in need of medical attention. An entry is proper when a police officer reasonably and in good faith believes an entry is necessary to render aid to a person in distress (People v. Henning, 18 Cal. App. 3d 872, 876). Considering the short five to ten-minute period during which the sequence of the clerk's two telephone calls and his first visit to the room took place, and the prompt communication of the information to Officer Fried, it was reasonable for him to conclude the clerk directly and very recently observed an apparently ill guest and required police assistance. People v. Henning, supra, 18 Cal. App. 3d 872, held reasonable an entry into a hotel room by police summoned by the desk clerk for assistance concerning a loud radio disturbance, where the clerk opened the door at the officer's request after there was no response to the officer's knocking, the officer then saw the apparently unconscious defendant lying only partly on the bed, and after stepping into the room saw narcotics and dangerous drugs in plain view within the room.

# APPENDIX A

The court in Henning, at page 875, held, on the facts before the court, it was reasonable to conclude, among other things, the officer entered the room with consent of the hotel employee who, the court concluded, had a right to enter a rented but presently unoccupied room[1] when reasonably necessary to stop a substantial annoyance to other guests. In this regard, the court in Henning said:

> "[I]t has been held that an innkeeper is under an obligation not to harbor persons 'dangerous to the peace and comfort of those for whose comfort he is bound to provide' [citation], to protect his patrons from 'annoyance' [citation], and to exercise proper care for the safety and tranquility of the guest [citation].
>
> "It seems most reasonable for the hotel people to have called upon a police officer for assistance, rather than risk violence in pursuit of their duty of care for the nighttime comfort, tranquility and quiet of their guests. If so, then it was equally reasonable for the police officer, on request and with their consent and under the facts before us, to assist in such an undertaking." (People v. Henning, supra, 18 Cal. App. 3d 872, at p. 875.)

While there are factual distinctions between this case and Henning, the analogy of the situation there to the facts before us persuades us to conclude the People showed Officer Fried's entry was within the rule stated in People v. Minervini, 20 Cal. App. 3d 832, at page 839, as follows:

> "[I]f the manager had a right to enter the rooms because of circumstances affecting the relationship between him and the defendants and between him

---

FOOTNOTE 1: It is to be noted in Henning, as in this case, the room was occupied.

# APPENDIX A

> and his property, that right would not be diminished if he sought police assistance in exercising that right or even if he was encouraged by the police to so exercise it. [Citations.]"

The circumstances in this case clearly effected the relationship between the manager and his guest in terms of the duty of the manager to exercise proper care for the safety and tranquility of the guest, Robinson, who did not respond to two phone calls or the clerk's door knocking and was apparently unconscious. (See also De Conti v. Superior Court, 18 Cal. App. 3d 907.)

There is substantial evidence to support the trial court's determination there was no Fourth Amendment violation. (See People v. Roberts, 47 Cal. 2d 374, 377.)

As was held in People v. Superior Court [Manfredo], supra, 17 Cal. App. 3d 195, Penal Code section 844 is not applicable to a case such as this where the officers are present not for the purpose of arrest, but to make a proper investigation in the course of which the crime is exposed to plain view. When the door was unlocked by the clerk who had a right to do so, the crime immediately became apparent to Fried, and it would then have been absurd to close the door, knock, identify himself, and explain his purpose, particularly considering the short time span between this event and the clerk's previous visit to the apparently unconscious Robinson.

With respect to the issue of consent by the clerk to search Robinson's room, a lodger has only the right to use the premises subject to the landlord's retention of control and right of access

# APPENDIX A

to them (Stowe v. Fritzie Hotels, Inc., 44 Cal. 2d 416, 421). In light of the motel's duty to exercise reasonable care for the safety of its guests, under the circumstances of this case, it was within the right of reasonable access by management to open the door of Robinson's room with Officer Fried present for the purpose of investigating the welfare of the occupant. (See People v. Minervini, supra, 20 Cal. App. 3d 832, 840.)

There was substantial evidence to support the trial court's determinations Penal Code section 844 was not applicable and there was no unreasonable search and seizure.

The judgment is affirmed.

J.

WE CONCUR:

P.J.

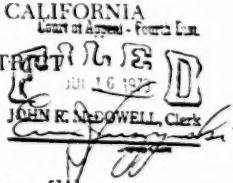
J.*

* Assigned by the Chairman of the Judicial Council

# APPENDIX B

COURT OF APPEAL — STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT




DIVISION ONE

PEOPLE, ETC.,

vs

WYNN LEWIS ROBINSON

4 Crim. NO. 5161

SUPERIOR COURT NO. CRN-1763

BY THE COURT:

Defendant's motion to recall remittitur and reinstate appeal is denied.

Acting P.J.

Copies to: Robert L. Fitzpatrick-LA
Attorney General-SD
District Attorney-SD
Superior Court-SD

APPENDIX C

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

OCT 3 1973

*I have this day filed Order*

HEARING DENIED

DOCKET
Ca. SD. 12-13
No. 5141
Entered by
Date 10-3-73

*In re:* 4 Crim. *No.* 5141

People

*vs.*

Robinson

*Respectfully,*

G. E. BISHEL
*Clerk*

11921-877 3-73 3M OSP

# APPENDIX D

## CALIFORNIA HEALTH & SAFETY CODE

**§ 11530.5 Possession of marijuana for sale; punishment; prior convictions.** Every person who possesses for sale any marijuana except as otherwise provided by law shall be punished by imprisonment in the state prison for not less than two years nor more than 10 years, and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than two years in prison.

If such a person has been previously once convicted of any felony offense described in this division or has been previously once convicted of any offense under the laws of any other state or of the United States which if committed in this State would have been punishable as a felony offense described in this division, the previous conviction shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or is admitted by the defendant, he shall be imprisoned in the state prison for not less than five years nor more than 15 years, and shall not be eligible for release upon completion of sentence, or parole, or any other basis until he has served not less than three years in prison.

If such a person has been previously two or more times convicted of any felony offense described in this division or has been previously two or more times convicted of any offense under the laws of any other state or of the United States which if committed in this State would have been punishable as a felony offense described in this division, the previous convictions shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or are admitted by the defendant, he shall be imprisoned in the state prison from 10 years to life, and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than six years in prison. (Added Stats.1961, c. 274, p. 1305, § 8.)

# APPENDIX E

LAW OFFICES OF
ROBERT L. FITZPATRICK
CABLES: FITZPAT

ROBERT L. FITZPATRICK
GARY BARNETT

9000 SUNSET BOULEVARD
LOS ANGELES, CALIFORNIA 90069
BRADSHAW 2-7771 CRESTVIEW 4561

January 15, 1973

DOCKET
CR SD
PG 23-138
Entered by K
Date 1-17-73
Farrell

Office of the Clerk
Court of Appeal
Fourth Appellate District
Division 1
6010 State Building
San Diego, California 92101

Re: People -vs- Wynn Lewis Robinson
4 Crim. 5141

Dear Sir:

Please be advised that oral argument is desired in the above entitled matter.

Because of the credibility questions involved, the complex fact situation, and the contradictory testimony, it is felt that oral argument would materially add to what is before the court, and it is estimated that no more than ten minutes would be required for said argument.

Very truly yours,

Robert L. Fitzpatrick

RLF:nb

cc: Hon. Evelle J. Younger
Attorney General
1350 Front Street, Room 5006
San Diego, California 92101

# APPENDIX F

Fourth Appellate District, Div. 1 Cr. 10857 2

[illegible] County Hon. Franklin R. Orfield, Judge

Superior Court No. CR-1793 Cause of Action Narcotics.

Notice of Appeal Filed: March 16, 1972 DIVISION ONE

| | |
|---|---|
| People, etc., Plaintiff - Respondent, | Evelle J. Younger, Atty.Genl., S.D., Edwin L. Miller, Jr., Dist.Atty., San Diego, Calif., 92101. |
| vs. | Jon F. Farrell, DAG |
| [illegible] LEWIS ROBINSON, Defendant - Appellant. | ~~Lynn Lewis Robinson (In Pro Per) 6715 Post Road Apt., Apartment #102, Terrance, Calif.~~ ~~Trial Attny:~~ Robert L. Fitzpatrick 9701 Wilshire Blvd., Suite 1100, Beverly Hills, Calif. 90212 Fifth 6-5-72 Los Angeles, 90069. |

| 1972 | | |
|---|---|---|
| Apr. | 17 | Filed record (C-R) on appeal from the judgment and sentence rendered on March 16, 1972. |
| | | Cause ordered submitted. |
| | | Argument waived, Cause submitted |

I, JOHN R. McDOWELL, Clerk of the Court of Appeal, Fourth Appellate District, State of California, do hereby certify that the preceding and annexed is a true and correct copy of minute Order of the Court dtd 3-13-73 as shown by the records of my office.

WITNESS my hand and the Seal of the Court this 11th day of March A.D. 1974

JOHN R. McDOWELL, Clerk

By R. J. Smith Deputy Clerk

# APPENDIX G

NO. 4 Crim. 5141

STATE OF CALIFORNIA
COURT OF APPEAL
FOURTH APPELLATE DISTRICT

People, etc.,

vs.

Wynn Lewis Robinson

OPINION

COPY OF OPINION FILED MARCH 14, 1973, SENT TO:

REPORTER OF DECISIONS (2)

ATTORNEY GENERAL, SAN DIEGO, CALIFORNIA, 92101

HON. FRANKLIN B. ORFIELD
JUDGE, SUPERIOR COURT
COUNTY COURTHOUSE
P.O. BOX 2724
SAN DIEGO, CALIFORNIA, 92112

HON. LEWIS M. WELSH
JUDGE, SUPERIOR COURT
COUNTY COURTHOUSE
P.O. BOX 2724
SAN DIEGO, CALIFORNIA, 92112

DISTRICT ATTORNEY, SAN DIEGO, CALIFORNIA, 92101

ROBERT L. FITZPATRICK
ATTORNEY AT LAW
9000 SUNSET BLVD.
SUITE 1100
LOS ANGELES, CALIFORNIA, 90069

Another copy mailed per request of Counsel 6-13-73

WYNN LEWIS ROBINSON
4315 WEST 182nd ST
APT. # 102
TORRANCE, CALIFORNIA, 90504

I, JOHN R. McDOWELL, Clerk of the Court of Appeal, Fourth Appellate District, State of California, do hereby certify that the preceding and annexed is a true and correct copy of opinion of the court as shown by the records of my office.

WITNESS my hand and the Seal of the Court this 15th day of March A.D. 1973

JOHN R. McDOWELL, Clerk

By _____ Deputy Clerk

# APPENDIX H

12 Feb 4

CR N 1763 | A 64993 | COURT CONVENES AT 9:00 A.M. (Time) DEPT. MARCH 16, 1972 (Date)

PRESENT

HONORABLE LOUIS M. WELSH JUDGE PRESIDING 7 (Dept.)

CLERK E. M. BRADLEY REPORTER BRUCE A. FISCHER

THE PEOPLE OF THE STATE OF CALIFORNIA R. FITZPATRICK (Deputy District Attorney)

vs

WYNN LEWIS ROBINSON (Defendant) ROBERT FITZPATRICK (Attorney for Defendant)

CRIME OF H&S 11530.5

☐ ARRAIGNMENT
☐ ARRAIGNMENT FOR JUDGMENT
☐ MOTION

☒ PROBATION
☐
☐

Defendant is present with counsel. Report of the probation officer is received. [illegible] and the [illegible] is suspended for a period of [illegible] upon the terms and conditions as set forth in the probation order signed and filed herein.

One year custody, Honor camp recommended.

Defendant files motion for appeal.

Deft's motion to stay proceedings pending appeal and to remain on bond previously filed is by the Court granted.

AW the amount

Bond remains in the amount of $18,750.00 Appeal bond to be filed.

At 4:00 P.M., by telecon, upon order of the Court, Counsel for defendant is directed to present appeal bond in the above amount and present it by Tuesday 3/21/72.

If appeal bond is not received as indicated above Bench warrant for defendant is to be issued.

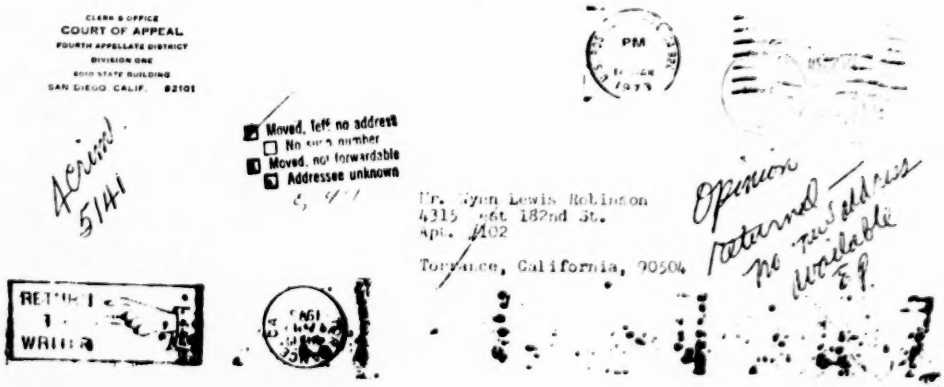
Phone No. of Def Cnsl 818-1-213 Br 2-7771

Address of Deft. 4315 W. 182nd St., Apt 102, Torrance, Calif. 90504 Cal. No. 7

CRIMINAL MINUTES

CR 02 Co. Cle. 3-71

APPENDIX I




I, JOHN R. McDOWELL, Clerk of the Court of Appeal, Fourth Appellate District, State of California, do hereby certify that the preceding and annexed is a true and correct copy of returned envelope as shown by the records of my office.

WITNESS my hand and the Seal of the Court this 11th day of March A.D. 19__.

JOHN R. McDOWELL, Clerk

By K. E. Smith
Deputy Clerk

# APPENDIX J

IN THE

## Court of Appeal, Fourth Appellate District
## State of California

DIVISION ONE

4 Crim. No. 2141

The People of the State of California,

Plaintiff and Respondent,

VS.

Wynn Lewis Robinson,

Defendant and Appellant.

**REMITTITUR**

ON APPEAL FROM THE SUPERIOR COURT IN AND FOR THE COUNTY OF San Diego

(Superior Court No. CRM-1763)

*The above-entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered,*

IT IS ORDERED, ADJUDGED, AND DECREED *by the Court that the*

----judgment----

*of the Superior Court in and for the County of* San Diego *in the above-entitled cause, be and the same* is *hereby* affirmed.

*I,* JOHN R. McDOWELL, *Clerk of the Court of Appeal, Fourth Appellate District, State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the* 14th *day of* March *, 19* 73 *, and now remaining of record in my office.*

I, JOHN R. McDOWELL, Clerk of the Court of Appeal, Fourth Appellate District, State of California, do hereby certify that the preceding and annexed is a true and correct copy of Remittitur as shown by the records of my office.

WITNESS my hand and the Seal of the Court this 11th day of March A.D. 19 74

JOHN R. McDOWELL, Clerk

By K. G. Smith Deputy Clerk

*WITNESS my hand and the seal of the court, affixed at my office, this* 14th *day of* May *, A.D. 19* 73 *.*

JOHN R. McDOWELL, *Clerk*

*By* Erin Jaeggi *Deputy*

# APPENDIX K

## CALIFORNIA RULES OF COURT

***Rule 28. Hearing in Supreme Court***

**(b) [Time for filing petition]** A party seeking a hearing must serve and file a petition therefor within 10 days after the decision of the Court of Appeal becomes final as to that court, except that a petition may not be filed after denial of a transfer to a Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court. Proof shall be made of the delivery or mailing of one copy of *the* petition to the clerk of the Court of Appeal which rendered the decision. When such *copy* is delivered to the clerk of the Court of Appeal, he shall forthwith transmit to the clerk of the Supreme Court the original record, briefs, and all original papers and exhibits on file in the cause. If the petition is denied, the clerk of the Supreme Court shall return them to the clerk of the proper Court of Appeal. If the petition is granted, they shall be retained and properly numbered by the clerk of the Supreme Court.

***Rule 24. Decision of reviewing court***

**(a) [When decisions become final]** All decisions of the reviewing courts shall be filed with the clerk, who shall forthwith transmit a copy of the opinion to the lower court or tribunal and to the parties. A decision of the Supreme Court becomes final 30 days after filing unless the court orders a shorter time or, prior to the expiration of the 30 day period or any extension thereof, orders one or more additional periods of time not to exceed a total of 60 additional days. A decision of a Court of Appeal becomes final as to that court 30 days after filing, except that the decision becomes final as to that court immediately after filing upon the denial of a petition for a writ within its original jurisdiction or a writ of supersedeas, without issuance of an alternative writ or order to show cause, *or the denial of an application for bail or to reduce bail pending appeal*, or the denial of a transfer to a Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court. When a decision of a Court of Appeal is final as to said court, it is not thereafter subject to modification or rehearing by said court. Where an opinion is modified without change in the judgment, during the time allowed for rehearing, such modification shall not postpone the time that the decision becomes final as above provided; but if the judgment is modified during that time, the period specified herein begins to run anew, as of the date of modification.

# APPENDIX L

CALIFORNIA RULES OF COURT

## DIVISION III
## RULES FOR PUBLICATION OF APPELLATE OPINIONS

*Adopted by the Supreme Court of the State of California*

***Rule 976. Publication of Appellate Opinions*** •

**(a) [Supreme Court]** All opinions of the Supreme Court shall be published in the Official Reports.

**(b) [Standard for opinions of other courts]** No opinion of a Court of Appeal or of an appellate department of the superior court shall be published in the Official Reports *unless such opinion (1) establishes* a new *rule* of law *or alters or modifies an existing rule,*[1] *(2) involves a legal issue* of *continuing* public interest,[2] *or (3) criticizes existing law.*[3] [*As amended effective Jan. 1, 1972; previously amended effective Nov. 11, 1966.*]

**(c) [Courts of Appeal *and appellate departments*]** *Unless otherwise directed by the Supreme Court, an* opinion of a Court of Appeal *or of an appellate department of the superior court* shall be published in the Official Reports if a majority of the court rendering the opinion certifies *prior to the decision becoming final in that court* that it meets the standard for publication *specified in subdivision (b). An opinion not so certified shall nevertheless be published in the Official Reports upon order of the Supreme Court to that effect.* [*As amended effective Jan. 1, 1972; previously amended effective Nov. 11, 1966.*]

**(d) [Superseded opinions]** Regardless of the foregoing provisions of this rule, no opinion superseded by the granting of a hearing, rehearing or other judicial action shall be published in the Official Reports. [*Renumbered effective Jan. 1, 1972.*]

# APPENDIX M

## California Rules of Court

***Rule 25. Remittitur***

**(a) [Issuance and transmission]** A remittitur shall issue after the final determination of any appeal, or of any original proceeding in review in which an alternative writ or order to show cause has been issued. Unless otherwise ordered, the clerk of the Supreme Court shall issue the remittitur when a judgment of that court becomes final, and the clerk of a Court of Appeal shall issue the remittitur upon the expiration of the period during which a hearing in the Supreme Court may be determined, including any extension of such period granted in the particular cause. The remittitur shall be deemed issued on the clerk's entry thereof in the register, and shall be transmitted immediately, with a certified copy of the opinion, to the lower court or tribunal. [*As amended effective Nov. 11, 1966; previously amended effective Jan. 1, 1957, and Jan. 1, 1961.*]

**(b) [Issuance forthwith]** For good cause shown, or on stipulation of the parties, the Supreme Court may direct the immediate issuance of a remittitur. The Court of Appeal may direct the immediate issuance of a remittitur on stipulation of the parties. [*As amended effective Nov. 11, 1966.*]

**(c) [Stay of issuance]** A reviewing court, for good cause, may stay the issuance of a remittitur for a reasonable period.

**(d) [Recall of remittitur]** A remittitur may be recalled by order of the reviewing court on its own motion, on motion or petition after notice supported by affidavits, or on stipulation setting forth facts which would justify the granting of a motion. [*As amended effective Jan. 1, 1951.*]